levant period of limitation, the Court should not exercise its discretion in favour of renewing the writ, the effect of which would be to deprive the defendants of an otherwise good defence to the claim, unless there were exceptional circumstances which amount to a good and sufficient cause for renewing the writ. The circumstances which would justify a renewal of the Writ were ably set out by Brandon J. (as he then was) in *The Berny* [4]. These circumstances are so well known that I need not repeat them. *The Kusu Island*, as it will be recalled, was in fact in Singapore on three occasions during the initial currency of the Writ. Although Caleb Brett had let down the Appellants, their lapses do not excuse the Appellants who unfortunately must accept the consequences. The Appellants had not exercised due diligence. *The Senang Island* and *the Kusu Island* were present within jurisdiction on so many occasions and there were ample opportunities for the Appellants, if they had been more vigilant, to have effected service of the Writ on either of them. Accordingly, I am of the view that the Registrar, who unlike the Assistant Registrar, was apprised of the visits of both the vessels, had properly exercised his discretion in setting aside the order renewing the Writ.

In the circumstances, the appeal is dismissed with costs as to prayer 2 of the Respondents' application. The appeal as to prayer 1 of the application is allowed with costs.

Order accordingly.

Solicitors: *Ong & Tan; Godwin & Co.*

MALAYSIAN REPORTS

C.C. NG & BROTHERS SDN. BHD. v. GOVERNMENT OF STATE OF PAHANG

[F.C. (Lee Hun Hoe C.J., (Borneo), Seah & Syed Agil Barakbah F.JJ.) November 11 & 13, 1984]
[Kuala Lumpur – Federal Court Civil Appeal No 196 of 1984]

Practice and Procedure – Application to strike out writ of summons and statement of claim on ground that it was abuse of process of court – Jurisdiction to be sparingly exercised.

Companies – Transfer of shares – Validity of – Companies Act, s. 162.

In this case the appellants had brought an action against a number of defendants, including the respondent. The 1st defendant was a company formerly owned by the Ng family. The 2nd defendant, Amanah Saham Pahang Bhd. had entered into a joint venture agreement to assign their timber concession to the 1st defendant, in consideration of the undertaking to transfer 51% of the shareholding of the 1st defendant to the 2nd defendant. The respondent (6th defendant) agreed to grant to the 2nd defendant a timber concession in Pahang. After the timber concession had been granted, the 2nd defendant assigned to the 1st defendant all the rights, title and interest of the 2nd defendant in the concession. The respondent (6th defendant) consented to the said assignment. In turn the Ng family transferred 51% of their shares in the 1st defendant company to the 2nd defendant. Subsequently the Ng family transferred their remaining 49% in the 1st defendant company to the appellants. Differences arose between the 2nd defendant and members of the Ng family and the appellants thereupon brought an action against the defendants in effect for an order that the agreement had not been validly terminated. As against the 6th defendant (respondent) the appellants claimed a declaration that it was bound to do all such acts and things as are necessary to make effective the concession agreement and assignment to enable the 1st defendant company to continue its operation. Conditional appearance was entered by the 6th defendant (respondent) and a summons-in-chambers was taken out (a) to set aside or strike out the writ of summons and statement of claim or (b) alternatively to strike out the name of the 6th defendant from the said writ and the statement of claim. The learned trial judge ruled that the "plaintiff's membership of the first defendant was *ultra vires* the articles and he could not bring himself with it to sue". The learned Judge made an order in terms of the summons. The appellants appealed.

Held: (1) in this case the inherent jurisdiction of the court was invoked to strike out the writ and statement of claim on the ground that it was an abuse of the process of the court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power and should be exercised with great caution;

(2) in this case no application had been made to challenge the validity of the transfers of the shares under

section 162 of the Companies Act. The questions posed before the learned Judge ought to be decided at the trial;

(3) the order of the learned Judge in striking out the writ and statement of claim against the respondent should be set aside as the respondent had not made good the various charges against the appellants.

Cases referred to:

(1) *Tractors Malaysia Bhd.* v. *Tio Chee Hing* [1975] 2 M.L.J. 1.
(2) *Lawrance* v. *Norreys* (1890) 15 App. Cas. 210, 219.

FEDERAL COURT.

Lim Kean Chye (*L.M. Ong* and *S.K. Lee* with him) for the appellants.
Dato' Wan Mohammad (Legal Adviser, Pahang), for the respondent.
S.E. Rajah holding watching brief for 2nd defendant.

Seah F.J. (delivering the Judgment of the Court): We allowed the appeal and indicated that we would give our reasons at a later date which we now do.

The appellants (plaintiffs in the Court below) took out a writ against eight defendants, *viz:*

1. Maran Road Sawmill Sdn. Bhd.
2. Amanah Saham Pahang Bhd.,
3. Haji Abdul Razak bin Hitam,
4. Haji Abdul Aziz bin Abdul Rahman,
5. Ramli bin Che Isa,
6. Government of the State of Pahang,
7. Hanafiah Raslan & Mohamad (sued as a firm); and
8. Mohd. Hassan bin Merican.

and claim the following reliefs:

"(a) as against the 6th defendant, a declaration that the purported termination of an agreement ("the concession agreement") made on May 5, 1978 and made between the 6th defendant and the 2nd defendant company and purported repudiation of an assignment of May 10, 1978 are of no effect;

(b) a declaration that the 6th defendant is bound to do all such acts and things as are necessary to make effective the said concession agreement and assignment and to enable the 1st defendant company to continue its operation for the remainder of the term of the said concession agreement;

(c) general and special damages against the 6th defendant;

(d) as against the 2nd defendant company, a declaration that the 2nd defendant company is bound by the said concession agreement and assignment and that the 2nd defendant be restrained from interfering with the operations of the plaintiff company;

(e) as against the 3rd, 4th and 5th defendants, damages for breach of duty as directors of the 1st defendant company;

(f) as against the 2nd, 3rd, 4th, 5th, 7th and 8th defendants, general and special damages for procuring the repudiation of the said concession agreement and assignment;

(g) as against the 2nd, 3rd, 4th, 5th, 7th and 8th defendants, general and special damages for inducing the 6th defendant not to issue the forest licence for 1983–1984 to the 1st defendant company;

(h) as against the 7th and 8th defendants, general and special damages for negligently preparing and publishing a report on the 1st defendant company's operations on January 21, 1983;

(i) costs, and

(j) such other or further relief as this Honourable Court shall deem fit and just."

Conditional appearance was entered by the 6th defendant (hereinafter referred to as the respondent) and on December 19, 1983 a summons-in-chambers was taken out (a) to set aside or strike out the writ of summons and the statement of claim, alternatively (b) to strike out the name of the 6th defendant from the said writ and the statement of claim and other consequential relief and costs.

The application was heard before Abdul Razak J. who after hearing the submissions of learned counsel for the appellants and the respondent, ruled that "the plaintiff's membership of the first defendant was *ultra vires* the articles and he could not bring himself with it to sue". The learned judge then made an order in terms of the summons and costs. Against such ruling the appellants had appealed to the Federal Court. Before dealing with the appeal we would like to set out briefly the relevant facts.

(i) Maran Road Sawmill Sdn. Bhd. (hereinafter called the 1st defendant company) was formerly solely owned by Datuk Ng Chee Cheong, Ng Wing Chong, Ng Yew and Datin Yee Wai Fong (collectively called "the Ng family") and others;

(ii) On May 2, 1978 Amanah Saham Pahang Bhd. (hereinafter referred to as the 2nd defendant) entered into a Joint Venture Agreement with the Ng family whereby, *inter alia*, in consideration of the 2nd defendant agreeing to assign their timber concession to the 1st defendant company the Ng family would undertake to transfer fifty-one (51%) per cent of the issued

and paid-up shareholding of the 1st defendant company to the 2nd defendant;

(iii) On May 5, 1978 the Government of the State of Pahang (hereinafter referred to as the respondent) entered into Agreement with the 2nd defendant whereby the respondent agreed to grant to the 2nd defendant a timber concession in the district of Jerantut and Kuantan, Pahang containing an area of approximately 90,000 acres;

(iv) After the timber concession had been granted to the 2nd defendant and pursuant to the Joint Venture Agreement of May 2, 1978, the 2nd defendant assigned to the 1st defendant company on May 10, 1978, all the rights, title and interest of the 2nd defendant in the said Timber Concession. The respondent consented to the said assignment. In turn, the Ng family transferred fifty-one per cent of their shares in the 1st defendant company to the 2nd defendant;

(v) Subsequently, the Ng family transferred the remaining forty-nine per cent of their shares in the 1st defendant company to C.C. Ng & Brothers Sdn. Bhd. (hereinafter called the appellants);

(vi) Differences have arisen between the 2nd defendant and members of the Ng family. Hence these court proceedings.

Learned counsel for the appellants mounted a three-prong attack against the ruling of the learned judge. First, it was submitted that the respondent was not and could not be construed as "the person aggrieved" within the meaning of section 162(1) of the Companies Act 1965. Section 162 reads:

"162(1) If –

(a) the name of any person is without sufficient cause entered in or omitted from the register; or

(b) default is made or unnecessary delay takes place in entering in the register the fact of any person having ceased to be a member,

the person aggrieved or any member or the company may apply to the Court for rectification of the register, and the Court may refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party to the application.

(2) On any application under sub-section (1) the Court may decide –

(a) any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members of alleged members or between members or alleged members on the one hand and the company on the other hand; and

(b) generally, any question necessary or expedient to be decided for the rectification of the register.

(3) The Court when making an order for rectification of the register shall by its order direct a notice of the rectification to be so lodged.

(4) No application for the rectification of a register in respect of an entry which was made in the register more than thirty years before the date of the application shall be entertained by the Court."

A number of authorities have been cited by learned counsel for the appellants in an attempt to show how the various courts in England and Australia have dealt with this problem. In our opinion, it was unnecessary to consider this question and it was wrong for the learned judge to do so since the matter was not properly before the Court. It was conceded by the learned State Legal Adviser, who was appearing on behalf of the respondent, that the application to strike out the writ and the statement of claim against the respondent, was made under the inherent jurisdiction of the Court and that it was not made under sub-section (1) of section 162 of the Companies Act 1965.

Next, it was the contention of the learned counsel for the appellants that the learned judge erred in law in declaring invalid the transfers of shares from the Ng family to the appellants when he had no jurisdiction to do so. It is common ground that the transfers had been registered on the register of members of the appellants and section 162 of the Companies Act 1965 has laid down the statutory procedure to challenge the invalidity of such transfers. As no application was made by the respondent under sub-section (1) of section 162 thereof this question was not properly before the court below and the learned judge was wrong to have entertained it.

It was lastly submitted by learned counsel for the appellants that the learned judge was wrong in law to have held that the transfers of the shares by the Ng family to the appellants was in contravention of Article 26(2) of the 1st defendant company and therefore null and void. The learned State Legal Adviser of the respondent did not appear to dispute that the transfers had been registered by the 1st defendant company in the register of mem-

bers. If the respondent is desirous of disputing the validity of these transfers they ought to comply with the statutory procedure set in section 162 of the Companies Act 1965. Since the respondent had failed to do so, in our opinion, the matter was not properly before the learned judge and he ought not to have ruled on it.

It was contended by the learned State Legal Adviser that the appellants had no *locus standi* to bring this action against the respondent inasmuch as the appellants were not parties to the Joint Venture Agreement dated May 2, 1978. For the appellants it was pointed out (correctly in our opinion) that in dealing with this submission the learned judge appeared to have failed to consider the Interpretation provision contained in Article 2 of the Articles of Association of the 1st defendant company where the "Shareholders" have been defined to mean "Ng Chee Cheong, Ng Wing Chong, Ng Yew and Yee Wai Fong. For the purposes of these Articles, the Shareholders include ..... any company or companies wholly-owned by the Shareholders and/or the immediate members of their family or families to whom and/or to which their shares in the Company may hereinafter to be transferred". "Company" means Maran Road Sawmill Sdn. Bhd., the 1st defendant company and "The Agreement" means "The Agreement dated May 2, 1978 made between the shareholders and ASPA" or to give its full name, Amanah Saham Pahang Berhad, a public company limited by shares incorporated in Malaysia and having its registered office at Bangunan LKPP, Jalan Gambut, Kuantan, Pahang. It was pointed out that the appellants, C.C. Ng & Brothers Sdn. Bhd. or CCNB has also been defined in Article 2 to mean "a private investment holding company limited by shares incorporated in Malaysia and having its registered office at Selangor Kwang Tung Association Building, Jalan Pudu, Kuala Lumpur, formed for the purpose of representing the Shareholders collectively".

In our judgment, this is not a proper time to consider these rival submissions when the inherent jurisdiction of the Court is invoked to strike out a writ and/or a statement of claim on the ground that it was an abuse of the process of the Court. The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution [per Lord Diplock in *Tractors Malaysia Bhd.* v. *Tio Chee Hing*[1]]. In *Lawrance* v. *Norreys*[2] Lord Herschell said words to the same effect that "It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". In our opinion, the question posed before the learned judge ought to be decided at the trial.

For the above reasons we allow the appeal and set aside the order of the learned judge in striking out the writ and the statement of claim against the 6th defendant as we are not satisfied that the respondent had made good the various charges against the appellants. The appellants are awarded costs here and below. Deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *Chung & Huang.*

CHEW HOCK SAN & ORS. v. CONNAUGHT HOUSING DEVELOPMENT SDN. BHD.

[F.C. (Seah, Mohamed Azmi & Syed Barakbah F.JJ.), September 18 & December 18, 1984]
[Federal Court Civil Appeal Nos. 144 & 146 of 1984]

Contract – Agreement for purchase of shophouse – Booking fee – Whether clerk of housing developer has authority to accept bookings – Ostensible authority – No authority to act on behalf of company.

Companies – Person purporting to act on behalf of company – Whether he has ostensible authority.

In this case the respondent was a licenced housing developer and was involved in the construction and development of a housing estate. The official booking for the shophouses had not commenced but a clerk accepted cheques for $5000/– from each of the appellants and issued type written receipts acknowledging the payments. The clerk kept the cheques which were not credited to the respondent's bank account until the date of the trial. The learned trial Judge was satisfied that the respondent had not represented to the appellants that the clerk was authorised to accept bookings on its behalf. He therefore dismissed their claims for specific performance of the purported sale agreements in which they alleged they had paid a booking fee of $5000/– each to the respondent's clerk. The appellants appealed.

Held: dismissing the appeal, this was a case where it would not normally be expected to be within the authority